

# Direct Effect of International Agreements of the European Union

Francesca Martines\*

## Abstract

*The Van Gend en Loos (VGL) decision established the conceptual premises of a crucial issue to shape the relationships between the European Union and international law: the function of direct effect as a powerful instrument to guarantee that the rules of one system are complied with in another legal order. However, if compared with direct effect of EU legal rules, the issue of the effects of EU international agreements is made more complicated by the combination of the more traditional question of the self-executing character of international agreement provisions and the narrow meaning of direct effect. The former issue, strongly affected by the technique of incorporation and the rank of international law obligations within the incorporating legal order, goes to the heart of the constitutional architecture of the EU legal order where a balance is to be found between the obligation to comply with international law and the integrity of the EU legal order. The latter notion concerns instead the relationship between the private person and the legal rule and defines the special character of the EU which distinguishes it from international law. Since such a quality of EU rules cannot be automatically applied to international law rules incorporated in the EU legal order it must be verified case by case. This is the reason why, for the present author, the double test approach, first applied by the ECJ in VGL, is the right test to determine direct effect of EU international agreements, but cannot be applied to verify the self-executing effect of international law in the traditional (broader) meaning.*

## 1 Introduction

One of the most celebrated statements of the *Van Gend en Loos* (VGL) decision is that there is an ontological difference between ‘classical’ international law as opposed to the ‘new’ (EEC) legal order as regards the effects of legal rules of these two orders in national systems of law.<sup>1</sup>

\* Associate Professor, Law Department, University of Pisa. Email: [martines@ec.unipi.it](mailto:martines@ec.unipi.it).

<sup>1</sup> On the correctness of this approach see for instance Spiermann, ‘The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order’, 10 *EJIL* (1999) 763, especially at 786.

Starting from this proposition, the issue discussed in this article is to what extent the international law origin of EU rules determines their effects in EU and national legal orders if one considers that the EU international agreements, once incorporated in the EU legal order, become *the law of the land*. In order to answer this question, two dimensions of the relationship between the two legal orders must be distinguished.<sup>2</sup>

First, the EU, in order to define itself as an autonomous legal order, needs to define its relationship with other legal order(s), and in particular, as relevant here, with international law. To do this, although not a state, the EU is confronted with the same

- <sup>2</sup> The literature on the subject of the relationship between international law, national and European Union law is immense. I found the following texts particularly useful: D'Aspremont and Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders', 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008) 939; Berkey, 'The European Court of Justice and GATT: A Question Worth Revisiting', 9 *EJIL* (1998) 626; Bradley, 'Intent, Presumptions and Non Self-executing Treaties', 102 *AJIL* (2008) 540; De Búrca, 'The European Court of Justice and the International Legal Order After Kadi', 51 *Harvard Univ Law J* (2010) 1; Cannizzaro, 'Il diritto internazionale nell'ordinamento giuridico comunitario: il contributo della sentenza Intertanko', 4 *Il Diritto dell'Unione Europea* (2008) 645; F. Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione Europea* (2008); De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', in G. De Búrca and P. Craig (eds), *The Evolution of European Union Law* (2011) 323; Eckes, 'International Law as Law of the EU: The Role of the Court of Justice', CLEER Working Papers, 2010, available online at [http://www.asser.nl/upload/documents/1212010\\_60145clee10-6web.pdf](http://www.asser.nl/upload/documents/1212010_60145clee10-6web.pdf) (last accessed 8 January 2014); Edward, 'Direct Effect: Myth, Mess or Mystery', 2 *Diritto dell'Unione Europea* (2003) 215; Etienne, 'Loyalty Towards International Law as a Constitutional Principle of European Union Law?', Jean Monnet Working Paper 02/2011, available online at <http://www.jeanmonnetprogram.org/papers/11/110301.html> (last accessed 8 January 2014); Gattinara, 'La questione pregiudiziale di validità rispetto al diritto internazionale pattizio secondo la sentenza IATA', 1 *Studi sull'integrazione europea* (2006) 343; Eeckhout, 'The Growing Influence of European Union Law', 34 *Fordham J Int L* (2011) 1490; Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2004); M.P. Maduro and L. Azoulay (eds), *The Past and the Future of European Union Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty* (2008); Konstadinides, 'When in Europe: Customary International Law and European Union Competence in the Sphere of External Action', 13 *German Law J* (2012) 1177; Lavranos, 'Protecting European Law from International Law', 15 *Eur Foreign Affairs Rev* (2010) 265; M. Mendez, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (2010), at 83 ss.; A. Nollkaemper and O.K. Fauchald (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012); Wessel, 'Reconsidering the Relationship between International and European Union Law: Towards a Content-Based Approach?', in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds), *International Law as Law of the European Union* (2011) 7; R.A. Wessel and S. Blockmans (eds), *Between Autonomy and Dependence: The European Union Legal Order under the Influence of International Organisations* (2013); J. Wouters, A. Nollkaemper and E. de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the European Union and Its Member States* (2008); Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *Int'l J Const L* (2008) 397; Uerpmann, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions', Jean Monnet Working Paper 9/03, available online at <http://www.jeanmonnetprogram.org/archive/papers/03/030901-02.pdf> (last accessed 8 January 2014); Vasquez, 'Judicial Enforcement of Treaties: Self-Execution and Related Doctrines', 100 *ASIL Proceedings* (2006) 439; Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Making of European Union Polity', 16 *Eur Law J* (2010) 1.

order of issues that have to be dealt with by national systems of law when they have to determine how to guarantee that their international obligations are complied with in the internal legal order and whether, and in which case how, to ensure in the domestic legal order a way of escaping these obligations when faced with a pathological event (the violation of obligations by another contracting party). In more general terms, any domestic legal order has to establish how to defend its values and core principles as an expression of its identity when incorporating rules which have been established in another (the international) legal order.

These problems, which, as mentioned, are shared by all domestic legal orders, are made more complicated by the special character of the EU and the requirement of a uniform application of international legal rules in the legal orders of its Member States. It is from this perspective that one has to consider the issue of direct effect in the broad meaning. This corresponds to the notion of *self-executing* effect of international law, a concept which has its origin in the US constitutional law, which concerns the structure of the incorporated international law rule. The rule must be capable of offering the judiciary (or the administration) the solution on how to regulate the dispute before it.

Secondly, one has to consider that there is another more specific quality of the rule: that is direct effect in a narrow meaning, as defined in its foundation by the ECJ (now CJEU) in its *Van Gend en Loos* decision. This notion refers to the conferment upon private persons of obligations and rights whose protection can be claimed before national courts.

The distinction between these two dimensions of the problem, that is the self-executing effect of international law (strongly connected with the issue of the mechanism of incorporation and of the rank of international rules in the national system of law) and the specific, narrow, notion of direct effect, may provide a critical interpretation of the case law of the ECJ on the effects of EU international agreements.

In other words, the *VGL* decision and its main legacies, in terms of autonomy of the legal order, the notion of direct effect, the role of individuals as subjects of the legal order, the methodology applied by the ECJ, and the function of direct effect (rule of law or ensuring the observation of the law), although developed to define the relationship between Member States and EU<sup>3</sup> legal orders, can provide a key to a better insight into the relationship between the EU and the international legal order and a critical understanding of the ECJ's case law on international treaty law effects.

The article is organized as follows. Section 2 will examine the principles governing the relationship between the EU legal order and international treaty law binding the Union and the technique of incorporation which, it is submitted, strongly determine the solution of the issue of the self-executing effect of international law provisions. This issue goes to the heart of the constitutional architecture of the EU where a balance is to be found between openness to international law, legal certainty, and compliance with international obligations assumed by the EU, and the integrity of the

<sup>3</sup> In this article I will use the term EU instead of EC, although the bulk of the case law of the ECJ dates back to the pre-Lisbon era.

constitutional principles which define its identity. Section 3 will deal with the issue of direct effect in its narrow meaning – the conferment on individuals of subjective rights, as defined by the *VGL* decision – and its application to EU agreements. The double test approach methodology, a main legacy of *VGL*, shows that whereas direct effect in the narrow meaning is the default rule for EU law, it is not so for rules having their source in international treaty law binding the EU regardless of their becoming, after incorporation, an integral part of the EU legal order. This is rather an exceptional effect, one that must be verified case by case. This explains why for the present author the double test approach in the *VGL* meaning cannot be applied when the discussion concerns the self-executing effect of international law in the traditional (broader) meaning.

## 2 Principles Governing the Relationship between the International and the EU Legal Orders

The question faced by all legal orders – how to ensure that the international law obligations assumed by a state are complied with in the national legal order – finds an answer in the definition of the rank of those rules in the domestic system of sources of law (A) and in the technique of incorporation of international law rules in the national (EU) legal order (B).

In the EU legal system these controversial issues are made even more complicated by the special nature of the EU, which has to ensure the compliance with international obligations not only by its own institutions (that is in the EU legal order) but also by Member States which are not contracting parties to EU (pure) agreements and which have not incorporated these agreements in their legal orders.

### A *The Supremacy of International Law over EU Secondary Legislation and in Member State Legal Orders*

One must first consider *the obligation of the EU to comply with international law*. Since the origin of the EEC, the Treaty, and even more clearly the present EU treaties, provide for the instruments to ensure compliance with the EU's international legal obligations. One of the crucial provisions is Article 216(2) TFEU, which establishes that the EU's international agreements bind EU institutions and its Member States.

As regards the EU institutions, this means that the legislature must adopt, when required, legislation to give effect to those provisions that need implementation and that later in time EU legislation incompatible with EU agreement provisions would not only give rise to the international responsibility of the EU (a consequence which, from the point of view of international law, would ensue in any case, regardless of the status of international law in domestic legal systems), but could also result in the annulment of the incompatible EU law.

The obligation of the EU to comply with international law (as a subject of international law which is the addressee of the *pacta sunt servanda* and *consuetudo est servanda* rules) is transmitted into the internal legal orders of the Member States. The obligation



for Member States to observe EU international commitments *qua* EU law is a further guarantee of compliance. This is ensured, first, by compelling Member States to adopt legislation to execute, when required, EU international provisions. Secondly, since EU agreements<sup>4</sup> become, from their entry into force, ‘an integral part of the European legal order’<sup>5</sup> they acquire the rank of EU law in Member States’ legal orders – *without any act of national incorporation*. It is only as a consequence of the status of the EU as a contracting party to an international agreement that the latter enjoys supremacy over Member States’ law. The conditions of the validity of international law obligations assumed by the EU in the Member States’ legal orders are actually determined only by the EU. Thus, the risk that Member States’ action might contribute to the international responsibility of the EU (by omitting executing measures or by adopting legislation incompatible with provisions contained in agreements concluded by the EU) is strongly reduced through the application of the principle of supremacy regardless of the rank that international obligations might assume in Member States’ legal orders. Moreover, uniform application of EU agreement provisions is ensured by the ECJ which extends its exclusive (and also binding) jurisdiction to interpret and to determine the effects of the international law provisions contained in the EU agreements.<sup>6</sup>

## ***B The Technique of Incorporation of EU International Agreements and Self-executing Rules***

Besides the (constitutional) decision as regards the rank of international law rules in the hierarchy of domestic (EU) sources, the other relevant constitutional choice made by any legal order concerns the technique whereby the domestic legal order *opens* to international law. It is maintained here that although the two issues are conceptually different, there is a close connection between the methods of incorporation of international law in domestic legal systems (and in the EU’s legal order) and the effects of international law rules when they become part of the domestic (EU) legal order.

When an ‘automatic incorporation’ method is applied, the will of the state is expressed ‘once and for all’.<sup>7</sup> Instead, in the case of a technique which provides for an

<sup>4</sup> This principle extends to acts adopted by institutions created by agreements as clearly established by the ECJ: see, e.g., Case 30/88, *Hellenic Republic v. Commission of the European Communities*, [1989] ECR 3711, at para. 13.

<sup>5</sup> As stated by the ECJ: see Case 181/73, *R. & V. Haegeman v. Belgian State*, [1974] ECR 449, and for customary international law Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3688. In *International Fruit Company* the ECJ confirmed its jurisdiction to assess the validity of EU legislation in the light of the alleged violation of international law: see Joined Cases 21–24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, [1972] ECR 1272, at paras 4–6. See *Haegeman*, *supra*, at paras 3–6.

<sup>6</sup> Art. 3(5) TEU; Art. 216 TFEU. The ECJ is therefore competent to interpret agreement provisions to ensure uniformity of application. In Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG aA*, [1982] ECR 3641, at para. 13, the ECJ qualified the obligation to guarantee compliance to obligations derived from agreements as an obligation also assumed *vis-à-vis* third parties. Later it clarified that the obligation was assumed towards the EC in the European legal order: see Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, at para. 11.

<sup>7</sup> This could happen also in legal orders that are considered dualist: see for instance Art. 10 of the Italian Constitution for customary international law, available at: [www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last accessed 8 January 2014).

‘act of transformation’ or an ‘order of execution’, an *ad hoc* statute is adopted for every single treaty.<sup>8</sup>

Apart from the theoretical and ideological approach underpinning these different choices, what seems interesting for our discussion is that where the technique of automatic incorporation is applied there is no *ex ante* evaluation of the content of the international law rule,<sup>9</sup> whereas in legal orders which incorporate international agreements through a formal *ad hoc* statute the evaluation of the completeness (efficacy) of the legal rule takes place when the statute is enacted. In this second case, the evaluation is made by the national parliament which resorts to the order of execution technique only if the agreement’s provisions are suitable for application without the necessity of further intervention by the legislature. If this is not so, it is the same parliament which intervenes by adopting integrating norms which are often included in the statute providing for the *ad hoc* incorporation. The *ex ante* evaluation made by the legislature therefore explains why – as a general rule – the so-called *self-executing* character of the rule, that is the *ex post* evaluation made by courts on the enforceability of the international rule, is not particularly contentious in what we can define as ‘dualist’ legal orders. The *ex ante* process of evaluation could make clear that there is a possible incompatibility of the international law rule with fundamental rights in constitutional provisions. This is made more evident in the case of the incorporation or execution of decisions adopted by institutions created by international agreements.

In legal orders (like the EU) which have opted for the technique of automatic adaptation to international law, the evaluation of the content of the incorporated rule, whether it is complete or whether it needs to be integrated by further legislation, takes place after incorporation. During the process of incorporation, when a margin for manoeuvre is left to the contracting parties when executing international obligations, the incompatibility with primary law could in principle be corrected in the implementing (incorporating) legislation.

The task of courts is thus much more critical in ‘monist’ legal orders, raising the thorny issue of the division of powers between the judiciary, the legislative, and the executive.

A positive finding by the ECJ on this issue (complete character of the international rule) certifies that legislative enforcement – that is the intervention of the EU’s or Member States’ legislatures – is unnecessary, at least as far as the specific norm which is the object of the decision is concerned. On the other hand, a negative finding by the Court (the agreement provision is not complete and needs integrating legislation to be enforced) highlights a situation of international breach or, at least, it makes clear that the provision can become enforceable only by the passing of implementing legislation, thus compelling the legislative to act in order to comply with the international obligation.

Moreover, the application of the international law rule by the Court makes it the guarantor of treaty compliance bypassing, at the time of enforcement, the executive

<sup>8</sup> An alternative method is the reproduction of the content of the treaty in a national statute, which is a technique applied when the agreement is not complete.

<sup>9</sup> It is not by chance that so-called monist legal orders usually contain constitutional provisions clarifying the status of international treaties in the domestic law.

branch of the government and dismissing any (possible) alternative enforcement mechanism or even a decision by the executive not to enforce the agreement.

We shall consider that, historically, 'dualist' techniques requiring the adoption by parliament of an act of execution of international treaty law responded to a need to avoid the situation where through international agreements the government could impinge upon the legislative power prerogatives. We will also consider that the finding on the self-executing quality of the international norms means incorporation into the national legal system of rules which not only may have been adopted with a little control by national parliaments (which are traditionally not involved in the negotiating stage of international agreements, but which in dualist systems are involved in the process of incorporation), but that represent the result of a trade off of the contracting parties' competing interests. International rules barely take into account individual rights and public interests the balancing of which is usually the domain of national legislations.

It should also be remarked that the relationship between international and EU law is reversed when international obligations are assumed by Member States alone. In that case international law provisions do not have primacy over EU secondary legislation, which could thus override them.<sup>10</sup> This is coherent with the autonomous character of the legal order; otherwise a Member State could derogate from EU law obligations by concluding an agreement with a third country. Thus the obligation of the EU to respect international law is something to be distinguished, as regards its scope and the instruments applied, from the obligation to comply with international law in the EU.

If the EU order thus appears rather permeable to international law provisions it has assumed, it seems much less permeable, although not watertight, as regards the international law obligations assumed only by Member States, and is even less permeable to international law in regulating the relations between Member States.<sup>11</sup> The validity of EU law cannot be assessed in the light of international law not binding the EU, although it is incumbent on the ECJ to interpret EU legislation taking into account agreements concluded by Member States falling within the field of application of EU law.<sup>12</sup>

<sup>10</sup> According to Art. 351 TFEU, Member States are not required to comply with EU law (and the institutions of the EU cannot use the EU's legal tools to oblige them to do this) in a case of incompatibility with commitments undertaken with third countries before they became members of the EU. Member States are, however, required to eliminate any incompatibility with EU law resulting from these agreements. A different case is that of a reference by EU legislation to an international agreement. In this case the 'incorporated' international law rules do not enjoy supremacy status and thus cannot be a ground of invalidity of EU legislation. As for the effect of such an incorporation the Court clarified that '[s]ince the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law is likewise not sufficient for it to be incumbent upon the Court to review the directive's legality in the light of the Convention': see Case 308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport*, [2008] ECR I-4057, at para. 50; Rosas, 'The Status in EU Law of Agreements Concluded by Member States', 34 *Fordham Int Law J* (2011) 1304.

<sup>11</sup> The limited possibility of reverting to international law in the European legal order had been affirmed by the Court from its early case law: see Case 7/61, *Commission v. Italy*, [1961] ECR 361, and Joined Cases 90/63 and 91/63, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, [1963] ECR 625.

<sup>12</sup> *Intertanko*, *supra* note 10, at para. 52.

To sum up, the combination of the primacy of EU international agreements over EU and national legislation and the technique of automatic incorporation of those agreements creates enormous pressure on the use by the ECJ of interpretative tools which can determine if and to what extent EU and domestic legislation conforms to international law obligations. From this perspective direct effect (broader meaning) can play a crucial role. If the ECJ denies direct effect to an international agreement provision it would limit the effects of international law in the EU, but also in the national legal orders, reducing the impact of international obligations *not assumed by Member States* in their legal orders.

The principles that have briefly been mentioned above show that the issue of direct effect of EU law has a common matrix with the issue of direct effect of international law as an expression of analogous constitutional problems: division and balance of powers, autonomy of legal orders, the role of the courts.

However, the complex system of interrelation between legal orders, the lack of a formal incorporation of EU international agreements in Member States' legal orders, the rank of international law in the EU and in Member States, the different status of international law when it is not binding on the EU may all explain the different rationale and the different outcome of the case law on direct effect of EU international agreements if compared with EU law's direct effect jurisprudence.

### 3 VGL's Legacies and the Direct Effect of EU International Agreements

#### A *Individuals as Addressees of Provisions and the VGL Interpretative Approach*

In *Van Gend en Loos* the Court used the expression *direct application* and not direct effect: in the sense that nationals of member states may on the basis of this article lay claim to rights which the national court must protect.

The notion thus assumes a very specific dimension, that is the recognition that private persons may be the direct addressees of EU legal order provisions which confer on them clearly defined rights. This can be considered a narrow meaning of direct effect as compared with a broader one, that is direct effect as referring to the clear, unconditional character of a rule which does not need to be completed by subsequent legislation and, as we will discuss later, which can possibly function *as a criterion of legitimacy* of domestic legislation.

The status of private persons as addressees of EU treaty law is at the very centre of the *Van Gend en Loos* decision. It is their recognition as subjects of the EU legal order that makes VGL one of the ECJ's *grands arrêts*. The subjects of the EU legal order are those persons who can enforce the rights (in the international law context they are, at most, considered beneficiaries of the situation of advantage provided for in the legal rule) conferred by the EU rule even against state non-compliance. The direct applicability of EU law is the consequence of the ontological



qualities of the new legal order. It is not exceptional (as in international law), but it is an inherent feature of the legal order that its rules (when clear and precise) are addressed to private parties as well as to Member States, a conclusion reached by the ECJ through a teleological approach (referring to the spirit and the general scheme of the treaty).

Had the ECJ only performed an analysis of the complete and clear character of the then Article 12 of the EEC Treaty (second part of the test), the *Van Gend en Loos* decision would have had a narrow scope and different implications in the legal order created by the EEC Treaty. On the other hand, if the Court had limited its analysis to the second part of the test, the EEC Treaty would have been equated to a classical international law agreement which can (or cannot) contain *self-executing* provisions. What really constitutes the turning point in *Van Gend en Loos* is that it is the legal order itself that stands out for its inherent feature of being addressed to private subjects as a default rule. Moreover, action by private parties before a national jurisdiction is a tool to ensure compliance by states with their legal obligations; this is achieved by setting states and private parties' interests against each other. To reach such a conclusion the ECJ had first to proceed to its 'contextual' and teleological analysis.

Once this has been established in *Van Gend en Loos*, the first part of the test analysis does not need to be repeated in the subsequent case law on the direct effect of EU Treaty provisions when the ECJ is required to determine the effect of other Articles of the Treaty (see the well-known cases of *Reyners*,<sup>13</sup> *van Duyn*,<sup>14</sup> and *Defrenne*<sup>15</sup>).

This methodological approach is instead replicated when the ECJ has to determine the direct effect of the EU's international agreements, regardless of the fact that they have become an 'integral part' of the EU legal order.

This happens because the specific structural feature of the EU cannot be automatically transposed in the context of the relationship between the EU legal order and international law where the status of individuals as subjects of international law is (and still remains) the exception. The assumption by the Court, from *VGL* onwards, is that international agreements are not designed to confer rights upon individuals (this can be inferred from the distinction made by the ECJ in *VGL* between the new legal order and classical international law). In order to determine such an effect, and thus before concluding that a private person can enforce the right conferred by a provision contained in an agreement binding the EU before a national tribunal, the ECJ has to verify whether the agreement is reproducing those conditions which can be assimilated to those of the EU legal order,<sup>16</sup> and on what basis Member States accepted direct effect of EU law.

<sup>13</sup> Case 2/74, *Jean Reyners v. Belgium*, [1974] ECR 631.

<sup>14</sup> Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337.

<sup>15</sup> Case 43/75, *Gabrielle Defrenne v. Sabena*, [1976] ECR 455.

<sup>16</sup> The double test was first applied in *International Fruit Company*, *supra* note 5 (where the GATT provisions were invoked by traders to contest the validity of EU measures restricting the importation of apples. The Court's reference concerned the purpose, the spirit, the general scheme, and the terms of the general

Direct effect thus does not depend on the existence of a provision explicitly conferring rights to individuals (this would greatly reduce the number of agreements having direct effect, since international agreements very seldom provide for those rights<sup>17</sup>), but depends on the agreement meeting two interpretative criteria: the spirit, structure, and nature of the agreement, first part of the test, and wording, as second part of the test.<sup>18</sup>

Only if the objective and scope and the global analysis of the system established by the agreement can lead to the conclusion that the agreement ‘intended’ to create individual rights *in the same manner* as the EU legal order creates individual rights, and only in this case can the agreement’s provision have direct effect.

It is moreover easier for Member States having accepted direct effect for EU law to accept, on the basis of the same reasoning, direct effect for international agreements binding the EU.

This is the background which can provide an insight, and a possible explanation, on case law – or at least on some decisions of the ECJ – on direct effect of agreements binding the EU when private persons rely on the agreement *as a direct source of subjective*

---

agreement). In Case 87/75, *Bresciani v. Amministrazione delle finanze dello Stato*, [1976] ECR 129, at para. 16, the Court confirmed this approach: it is worth noting that Trabucchi AG, who was one of the judges in *Van Gend en Loos*, argued that it was necessary ‘at the same time to take the Convention into account in order to identify the [Member] State’s Community obligation, which is based on the Treaty and is specifically defined in the Convention binding the Community’.

<sup>17</sup> The exclusion of direct effect is provided for unilaterally in the practice of states, as happens in the preamble to the decision of the conclusion of the WTO agreement (Council Decision 94/800, OJ 1994 L 336/1). On this point see the observation of Gaja, ‘Il preambolo di una decisione del Consiglio preclude al “GATT 1994” gli effetti diretti nell’ordinamento comunitario?’, 78 *Rivista di Diritto Internazionale* (1995) 407. In the case of the agreement concluded by the EU with South Korea the exclusion is contained in Art. 8 of the Decision and not in the preamble. See Council Decision 2011/265/EU, OJ 2011 L 127/1. In any case one should discuss the question of the effects of agreements in the correct context. If one considers the international context, unless the effects of the agreement’s provisions are fixed in the treaty itself, the only obligation which derives from the *pacta sunt servanda* principle is that contracting parties are obliged to give effect to the provisions of the agreements in the national legal system using whatever instruments they may consider appropriate. The *pacta sunt servanda* obligation does not automatically entail the direct effect status of rules contained in an agreement. The agreement must be complied with, but states are free to decide how to perform this duty. However, the ECJ has excluded direct effect as an instrument of compliance as far as the WTO agreements are concerned. The exclusion of one of such instruments made unilaterally by a contracting party has effect only within the domestic (EU) legal system.

<sup>18</sup> This very general and commonly made observation should be further discussed. The will of the contracting parties to an agreement has certainly to be taken into account by national judges when considering the effect of a provision of it. However, this does not rule out an independent interpretation of the provision itself. The will of the contracting parties could, in other words, satisfy the first part of the test (the will to confer rights on individuals), but it does not automatically satisfy the second one (clarity of the rule). In an agreement there could be self-executing provisions but also provisions which, even if they were intended to confer rights on individuals, might require further legislative action, and for this reason – whatever the will of the contracting parties – cannot be applied by national tribunals or by the administration. But can the will of the legislature limit the role of the ECJ in interpreting the agreement? The arguments of Saggio AG in Case C-149/96, *Portugal v. Council*, [1999] ECR I-8307, at para. 20, and Tesouro AG in Case C-53/96, *Hermés v. FHT*, [1998] ECR I-3606, at para. 24, seem to suggest a negative answer. What counts is the character of the rule which must be sufficiently operational in itself; in other words, the second part of the test needs to be satisfied in any case.

*rights*, usually, but not exclusively, to discard a national or EU rule which would otherwise be applicable. The clear and unconditional character of the provision (which in a domestic legal order would be the crucial criterion on the *self-executing* character of a rule) cannot, by itself, be the only decisive criterion in the analysis. This is illustrated by the Court denying that similarly formulated provisions in the Treaty and in the international agreement could have the same effect and the same interpretation in the EU legal order.

The bulk of the case law on direct effect – until the last decade or so – concerned (with the exception of the GATT and WTO agreements which are not discussed in this article) agreements which create close links (association, pre-accession, cooperation, cooperation for development)<sup>19</sup> between the EU and its partners. Moreover, the provisions of those agreements were invoked by private parties (traders, immigrants, workers), not in the abstract, but in order to claim the enforcement of a specific subjective right provided for by the agreements. It is true that the ECJ's emphasis on the first part of the test seems to have been less accentuated in the more recent case law<sup>20</sup> (with a reversal of the order of the examination by the ECJ: it first analyses the content of the rule and then it applies the aim of the agreement test usually as a non-contradiction type of analysis), but this could be explained by a consolidated theoretical approach regarding these agreements. In the recent *Brown Bear* case<sup>21</sup> the Court was confronted with the question of the direct effect of a provision contained in the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters of 25 June 1998 (Aarhus Convention) promoted by the UN Economic Commission for Europe (UNECE). This is a mixed agreement in EU law. This agreement aims at guaranteeing the rights of access to information, public participation in decision-making, and access to justice in environmental matters (Article 1). The contracting parties are required to adopt all necessary (legislative and regulatory) measures to ensure access to environmental information and public participation in a decision on a number of activities listed in the Convention and access to justice. The Convention is very detailed as regards the position of individuals.<sup>22</sup>

<sup>19</sup> See, *inter alia*, Case 87/75, *supra* note 16; Case 17/81, *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] ECR 1331; Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461; Case C-416/96, *Eddline El-Yassini*, [1999] ECR I-1209; Case C-37/98, *Savas*, [2000] ECR I-2927; Case C-63/99, *Gloszczuk*, [2001] ECR I-6369; Case C-265/03, *Simutenkov*, [2005] ECR I-2579; Case C-97/05, *Gattoussi*, [2006] ECR I-11917.

<sup>20</sup> For instance, the ECJ in Case C-162/00, *Nordrhein-Westfalen v. Beata Pokrzepowicz-Meyer*, [2002] ECR I-1049, a case regarding the principle of non-discrimination contained in the association agreement concluded with Poland (before it became a member of the EU) confirmed the usual formulation as regards direct effect of international agreement (at para. 19) then it started its analysis by examining the content of the provision (at paras 21–22) and only at the end (at para. 26) did the ECJ refer to the aims and structure (develop cooperation and overcome imbalance) which do not preclude direct effect of its provisions.

<sup>21</sup> See Case C-240/09, *Lesoochranské zoskupenie VLK (Brown Bear)*, [2011] ECR I-1255.

<sup>22</sup> Eckes, 'Environmental Policy "Outside-In": How the European Union's Engagement with International Environmental Law Curtails National Autonomy', 13 *German Law J* (2012) 1152, at 1155.

The question examined by the ECJ, on a preliminary reference made by the Supreme Court of the Slovak Republic, concerned the direct effect of Article 9(3) of the Aarhus Convention which provides for the obligation of the Parties to ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.<sup>23</sup> In this case, an environmental protection association pretended to enforce this right before national Slovak authorities. The Court<sup>24</sup> confirmed the application of the double test, but denied direct effect to Article 9(3) of the Aarhus Convention on the basis of the wording of the provision (second part of the test) and without discussing the first threshold. This does not seem to contradict the validity (and relevance) of the double test approach. First, the ECJ's analysis responds to judicial economy, the conditional nature of the provisions being the most contentious issue in this case. Secondly, the ECJ's reference to the double test seems to signal the Court's readiness to have recourse, if necessary, to the first part of the test.

## B The Application of the Double Test in the Case Law of the ECJ and Its Critique

A different and most controversial question is whether the double test to assess direct effect in its narrow *Van Gend en Loos* definition – creation of subjective rights for individuals – can be applied when international law is invoked as a ground for the invalidity of EU law in a preliminary procedure or in the context of infringement proceedings. This is the kind of situation that was discussed, for instance, in *Pêcheurs de*

<sup>23</sup> The Aarhus Convention (2161 UNTS 447) provides for access to information (1st pillar); public participation (2nd pillar) and access to justice (3rd pillar), that is the right to have recourse to administrative or judicial procedures to challenge acts and omissions of private persons and public authorities violating the provisions of environmental law. Two directives (Directive 2003/4/EC, OJ 2003L 41/26 and Directive 2003/35/EC, OJ 2003L 156/17, have been adopted to secure application in Member States of the first and second pillars of the Aarhus Convention. Regulation 1367/2006, OJ 2006L 264/13, secures the Convention's application to Community institutions and bodies. For the application to national public authorities a proposal for a directive was presented but not adopted. The necessity of a directive providing for a common minimum standard for access to justice was justified by the Commission, which underlined the high level of differentiation of procedural provisions between the Member States and the transboundary dimension of environmental problems: Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, COM(2003)624 final, 2003/0246(COD). The horizontal private enforcement (in conformity with Art. 9(3) of the Convention), actions both against national authorities and against private parties and the legal standing of environmental organizations and citizens were the most contentious issues during the negotiation process.

<sup>24</sup> Case C-240/09, *supra* note 21, at para. 85. The case raises interesting questions as regards the division of powers between the EU and Member States. The Aarhus Convention is a mixed agreement. Since in the declaration of the division of competence it was stated that Art. 9(3) fell within Member States' competences until the adoption by the EU of legislation covering the implementation of that provision, one of the questions discussed was whether the ECJ had jurisdiction to interpret Art. 9(3). The Court concluded that it had competence to interpret Art. 9(3) since the issue concerned related to the field covered 'in large measure' by EU law. *Ibid.*, para. 42.



*l'Etang de Berre*,<sup>25</sup> *Intertanko*,<sup>26</sup> *IATA*,<sup>27</sup> *Netherlands v. Parliament and Council (Biotech)*<sup>28</sup>, *Commission v. France (Etang de Berre)*,<sup>29</sup> and *ATAA*.<sup>30</sup>

In *Pêcheurs de l'Etang de Berre* the dispute did not involve a subjective right, but rather an interest of private persons to have the international rules applied. In the *IATA*, *Intertanko* and *ATAA* cases claimant parties tried to quash the stricter EU regime claiming incompatibility of the EU legislation with international law. In *Biotech* a Member State required the annulment of a directive on the ground, *inter alia*, of incompatibility with the Convention on Biological Diversity.

The double test does not seem to fit the control of validity of secondary legislation or Member State law where private parties are those who might benefit from the international (less strict) provisions but who cannot claim a subjective right in a proper sense.

It is argued that in these cases the ECJ should analyse only the content and the scope of the international rule to verify whether it can be applied in the case (*Pêcheurs de l'Etang de Berre*) by the national court (setting aside national incompatible measures), or whether it may be applied as a benchmark by which to assess the compatibility of national (or the validity of European) legislation (*Biotech*, *Intertanko*, *IATA*, and *ATAA*).

The evaluation should, in this case, be based on the assessment of the clear and precise character of the obligation, which does not require for its implementation the adoption of any subsequent measure.<sup>31</sup> The reference to the spirit and the structure of the agreement should also be taken into account, not in order to assess whether it was intended to confer subjective rights on individuals, but as a common process of interpretation which examines the rule in its context and does not satisfy itself with an analysis limited to its wording, as clearly established by international customary rules of interpretation.

The most interesting example of this approach (especially if compared with the previous case law, in particular *Germany v. Council*,<sup>32</sup> although that case concerned the WTO agreement) is the decision in *Netherlands v. Parliament and Council (Biotech)*, where the Court stated, '[e]ven if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not *create rights which individuals can rely on directly before the courts*, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement'.<sup>33</sup> The Court then gave an interpretation of the relevant

<sup>25</sup> Case C-213/03, *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v. Électricité de France (EDF)*, [2004] ECR I-7557.

<sup>26</sup> Case C-308/06, *supra* note 10.

<sup>27</sup> Case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, [2006] ECR I-403.

<sup>28</sup> Case C-377/98, *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, [2001] ECR I-7079.

<sup>29</sup> Case C-239/03, *Commission of the European Communities v. French Republic*, [2004] ECR I-9325.

<sup>30</sup> Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, judgment of 3 February 2012 (not yet published in the ECR), available online at <http://curia.europa.eu/juris/documents.jsf?num=C-366/10> (last accessed 8 January 2014).

<sup>31</sup> *Ibid.*, at para. 55.

<sup>32</sup> Case C-280/93, *Germany v. Council*, [1994] ECR I-4973.

<sup>33</sup> *Supra* note 28, emphasis added.

international law rules (i.e., the Convention on the Biological Diversity) which provide a benchmark for an assessment of the compatibility of the Convention with the contested directive.<sup>34</sup>

In *Commission v. France* the ECJ examined the provisions of the international agreements without any reference to their direct effect.

In *Pêcheurs* the question discussed was whether the agreement (Protocol of the Barcelona Convention for the environmental protection of the Mediterranean) had direct effect and could be applied by the (French) court to compel EDF to stop the discharges from its hydroelectric power station into the Etang de Berre. The ECJ made reference to what seems a clear definition of direct effect in a broader sense (not subject to the adoption of subsequent measure).<sup>35</sup> The ECJ<sup>36</sup> refers to wording clearly and unconditionally defining Member States' obligations under the agreement, and to the purpose and nature of the agreement in order *to support* the previous finding.<sup>37</sup>

In *IATA* the Court, referring to the Montreal Convention, argued, '[a]s to those submissions, Articles 19, 22 and 29 of the Montreal Convention are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise'. Then it continued, '[i]t is to be noted with regard to the interpretation of those articles that, in accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives'. The reference in paragraph 39 is not crystal clear, but it should be noted that the Court then seems to apply the broader direct effect approach to determine the content of the provisions discussed.

However, in *Intertanko* the Court discarded the UN Convention on the Law of the Sea as a benchmark by which to assess the validity of EU Directive 2005/35,<sup>38</sup> since this Convention did not pass the (strict notion) direct effect test. As noted above, this does not seem, with respect, to be a correct test, since the claimants did not invoke subjective rights but contested the incompatibility of international law obligations with the above-quoted directive (that is the conditions whereby a rule can be used as a parameter for another one).

In *ATAA*,<sup>39</sup> the ECJ, with reference to the nature of the Kyoto Protocol, referred to the Protocol's degree of flexibility as to the compliance with the obligations enshrined therein and underlined that the Conference of the Parties had the responsibility of approving the necessary measures to determine and address situations of non-compliance with the Protocol. This reminds us of a GATT type argument.<sup>40</sup> Moreover, the

<sup>34</sup> *Ibid.*, in particular at paras 61 and 66.

<sup>35</sup> Case C-213/03, *supra* note 25, at para. 39.

<sup>36</sup> *Ibid.*, at para. 41.

<sup>37</sup> *Ibid.*, at para. 43.

<sup>38</sup> OJ 2005 L 255/11.

<sup>39</sup> See *ATAA*, *supra* note 30, at para. 53.

<sup>40</sup> *Ibid.*, at paras 73–76.

Protocol's relevant provisions, such as Article 2(2), are not considered by the ECJ, as regards their content, unconditional and sufficiently precise so as to confer on individuals the right to rely on them in legal proceedings in order to contest the validity of Directive 2008/101.<sup>41</sup>

As for the 'Open skies' agreement, the Court seems to apply the double test with reference to certain Open Skies rules designed to apply directly and immediately to airlines and thereby to confer upon them rights and freedoms which are capable of being relied upon against the parties to that agreement, and the nature and the broad logic of the agreement do not so preclude, the conclusion can be drawn that the Court may assess the validity of an act of European Union law, such as Directive 2008/101, in the light of the provisions of the agreement. It follows an examination of the unconditional and sufficiently precise nature of some of the Open skies agreement's provisions.

To sum up, it seems that the double test in cases where the Court is called on to determine the validity of EU (or national) rules adds a condition to the supremacy of international law over secondary legislation not provided for in the EU treaties and seriously clashing with the EU's constitutional value of compliance with international law. Thus, the double test must be applied only in order to verify whether the international law provision confers a subjective right on private persons in Member States' legal orders; that is it should be verified whether this constitutional feature of the EU law rules is reproduced in the context of an international agreement binding the EU and automatically incorporated in its legal order and in Member States' law.

In order to assess whether the obligation to comply with international law as a constitutional value is satisfied, a test which verifies whether the rule can be used as a benchmark, that is its complete and unconditional character, should instead be applied. This would also improve the ECJ's opportunity to achieve, through the interpretation of EU legislation in the light of the international agreement rules, the above-mentioned balance between incorporated international law and EU values.

The application of the larger notion of direct effect to verify the compatibility of national and EU legislation with international law *would* overcome the inconsistency with EU law, where the incompatibility of secondary legislation with the treaties or a superior law does not depend on the direct effect quality of the benchmark rule. Secondly, the peculiar and inconsistent consequences would be removed: the same piece of EU secondary legislation would be considered invalid because it was incompatible with a rule contained in a direct effect agreement, but the same rule could not be challenged on the ground of an identically formulated substantive provision contained in a different agreement which did not satisfy the first part of the test.

The same problems of consistency and the illogical consequence of applying the same test to different questions could be demonstrated with reference to international customary law.

Although international customary law could be self-executing (clear and precise), for its intrinsic characteristics this source of law does not create subjective rights that

<sup>41</sup> OJ 2009 L 8/3.

can be invoked before a national court.<sup>42</sup> Let us consider the case of a rule contained in an agreement which is the codification of an international customary rule: could a different test be applied to the same rule depending on the source (treaty or customary) which provided for it, in order to evaluate the consistency of EU (or Member State) legislation with EU international obligations? The answer seems negative.

There is, of course, an important difference between EU agreements and customary international law. The latter binds Member States as subjects of the international legal order and does not raise a question of incorporation in Member States, whereas, as already mentioned, EU agreements are part of Member States' legal order automatically after ratification by the EU. The incorporation of customary international law in the EU legal order, its being an 'integral part of the EU legal order' (thus binding Member States also as an obligation deriving from the EU legal order) however, gives customary international law a rank above national (and EU) law regardless of the choices made by Member States as regards the opening of their legal systems to international customs and the rank of customary international law in the national legal systems. It also means that the ECJ has the jurisdiction to interpret and – as we are here discussing – to appraise the compatibility of national law with customary international law.

## 4 Concluding Observations

It is an indisputable fact and a common narrative that the recognition of direct effect is one of the pillars of the so-called process of constitutionalization of the EU defining its relationship with Member States' legal orders. This principle has a comparable constitutional impact in the relationship between the EU and the international legal order. However, if the issue of direct effect of EU law has been settled, at least in its foundations, the direct effect of agreements binding the EU seems to be still in question and in need of systematization. What could contribute to an evaluation of the case law is a terminological and substantial distinction. On the one hand the EU, in order to define its relationship with international law, had to determine the methods of incorporation of international law rules and their rank in its (and Member States') legal order. These choices affect the issue of the self-executing character of international rules and create an underlying tension between the opening up and the commitment to comply with international law and the defence of EU autonomy.

On the other hand, if these issues are common to all domestic legal orders and raise analogous constitutional problems (division of powers, role of the courts), these are made more complicated due to the constitutional structure of the EU.

However, when dealing with the *VGL* decision and the definition of direct effect, it should be considered that for the ECJ the EEC legal system is to be distinguished from international law for a specific quality of the EU rule, that is of reaching directly the individuals who become subjects of the rights provided for the EU legal rule.

<sup>42</sup> International customary law on human rights is addressed to states, and private parties are only the beneficiaries of these provisions.



Clearly both questions, the self-executing and direct effect of an international rule, although they must be distinguished, call into question the relationship of the EU legal orders with international law and the crucial role of the ECJ.

It also results from the case law that the assessments made by the ECJ regarding the spirit and the content of the rule, its completeness, clarity, and unconditional character, may be very contentious and leave the ECJ a rather wide margin of discretion in deciding whether, how, and to what extent the EU legal system is permeable to international law. The factors taken into consideration by the ECJ especially in assessing the first part of the test (reciprocity,<sup>43</sup> the creation of a special relationship, the establishment of a dispute settlement mechanism, the possibility of returning to safeguard measures, the flexibility of the obligations) are the object of endless debates.

One has to accept that the ECJ has very high political sensitivity and a clear perception of what is at stake. Thus, the flexibility of the double test gives leeway to the ECJ in taking, pragmatically, into account a division of power issue. This means deciding, for example, that the provisions require, implicitly or explicitly legislative execution, or that the agreement structure leaves the choice of how to implement its provisions to the political branches of the government. On the other hand, it gives the interpreter enough flexibility to respond and to adjust to changing circumstances and situations,<sup>44</sup> thus remedying the rigidity of the structural EU constitutional principle of supremacy of international law over secondary legislation. The ECJ operates a sort of *ex post* control which, as submitted above, is closely related to the mechanism of automatic incorporation of international treaty law into the EU legal system.

Any domestic legal system is in search of a satisfactory balance between international commitments and national values. While the autonomy of the EU legal order *vis-à-vis* its Member States is functional to validate its authority, once this authority has been established (with its identity built around values, but also economic power) it has to be asserted and defended against the international legal system.<sup>45</sup>

It should be underlined that the very existence of such an issue in the EU legal order is a demonstration of its representation or self-representation as a quasi-domestic legal order: in EU law we find reproduced with due caution the dichotomy between international law and national sovereignty we find in domestic systems.

There is of course a risk in approaching international law binding the EU selectively which can result in the very denial of international law, if pushed too far. The solution

<sup>43</sup> This seems very contentious because, on the one hand, the Court had paid attention to the question of balance of rights and obligations provided for in an agreement; on the other hand it had considered that the recognition of direct effect by other contracting parties was not a reason to deny direct effect of an agreement in the EU legal order. It recognized that the status of third nationals in the Member States could be more favourable than that of EU citizens in the territory of the other contracting parties.

<sup>44</sup> See for instance the observations made by J. Scott as regards the *Demirel* case where the author underlines that the denial of direct effect by the Court responded to the changing labour requirements of European industry: see J. Scott, *The Critical Lawyer's Handbook*, vol. I, available online at [www.nclg.org.uk/book1/2\\_12.htm#intro](http://www.nclg.org.uk/book1/2_12.htm#intro) (last accessed 8 January 2014).

<sup>45</sup> Joined Cases C-402/05 and 415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6531, at para. 285, and *Intertanko*, *supra* note 10, at paras 39, 49, 66, and 74.

should not be found in the choice between alternative values, but rather in coordination and reciprocal integration.

Of course, autonomy is not a value *per se*, but only and to the extent that the defence of autonomy translates into, or is the expression of, the values of the polity. At the same time the effectiveness of international commitments made by the EU reinforces its stance as a reliable actor in the international community, contributing to the assertion of those values which are an integral part of its identity.

Moreover, international law must not be perceived only in the negative, that is as a limit of EU action and autonomy. Actually, international law's integration into the EU legal order, the opening up of the EU legal system to international law through automatic incorporation, all means that the EU's values and aims are to be achieved not exclusively within the 'domestic' context but in the international legal order as well. At the same time international agreements incorporate into the EU legal order substantial values which prevail over those expressed in the EU's legislation.

A decision on direct effect thus becomes one of the 'locus' where the tension between the EU's constitutional value of complying with international law and the balance of incorporated and domestic values takes place.

On the other hand it should also be considered that the EU provides a way of protecting its legal order when it establishes that the *permeability* to its international law obligations (technique of automatic incorporation combined with supremacy over secondary legislation) finds a limit in the EU treaties and in the Charter of Human Rights.<sup>46</sup> What could be called the sub-constitutional supremacy<sup>47</sup> of international law means that the incompatibility of an agreement's provision with primary law might be a limit to the direct application of its provisions. It is clear that this question would arise only in the context of an *a posteriori*<sup>48</sup> control of *compatibility*<sup>49</sup> of international agreements with EU primary law. In this case the agreement (or the provisions which are incompatible) would be considered as not having been incorporated. In other words, Article 216(2) of the TFEU provides for the incorporation *only* of international agreements that do not impinge upon the constitutional rules of the EU legal order. A possible remedy in the event of violation of the EU treaty rules on the legal basis or the violation of the

<sup>46</sup> This is confirmed by Art. 218(11) TFEU and by the ECJ: see *International Agreement on Natural Rubber, Opinion 1/78*, [1979] ECR 2871; *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinion 1/91*, [1991] ECR I-6079, at para. 46; *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94*, [1996] ECR I-759, at para. 35; see also Case C-211/01, *Commission of the European Communities v. Council of the European Union*, [2003] ECR I-8913; Cases C-402/05 and 415/05, *supra* note 44, at paras 308–309.

<sup>47</sup> On the relationship between EU and international legal orders see Wessel, 'Reconsidering the Relationship between International and European Union Law: Towards a Content-Based Approach?', *supra* note 2.

<sup>48</sup> It is well known that the evaluation by the ECJ of the compatibility of an agreement with the EU Treaties on the basis of the procedure ex Art. 218(11) TFEU prevents the entry into force of the agreement unless the agreement is amended or the Treaties are modified.

<sup>49</sup> See, e.g., *Lenz AG in Case 165/87, Commission v. Council*, [1988] ECR 5545, at para. 34.

institution competences would be, if possible,<sup>50</sup> the maintenance of the effects of the agreement while allowing the institutions to remedy the Treaty violation.<sup>51</sup>

The monist approach (in national legal orders) and the primacy of international law are historically founded on the Kantian idea of universal peace and the belief that incorporation of international law in the national legal system would incorporate the values of universalism opposed to those of a non-democratic and conservative state or to modern individualism. This vision might have contributed to the idea that international law is always a progress in respect of national law. It is, however, not always so. And, although, as first highlighted in *Van Gend en Loos*, private parties play a decisive role in guaranteeing enforcement and compliance with international law, it should be underlined that interests of private parties could also conflict with the public good.<sup>52</sup>

As mentioned above, the positive decision of the ECJ on direct effect removes the decision on enforcement mechanisms from the executive or the legislative. This is particularly contentious in the EU system for the extensive ECJ jurisdiction to interpret provisions in mixed agreements as demonstrated in case law<sup>53</sup> with a parallel restriction of national courts' jurisdiction.

At the same time the enforcement of treaties by judicial decision is a guarantee that the law is applied and respected (rule of law argument). From this perspective, the principle of consistent interpretation of national legislation (when, of course, there is national legislation to be interpreted<sup>54</sup>) as an alternative to enforceability of agreement provisions plays an interesting function, as demonstrated in the *Brown Bear* case.<sup>55</sup> Instead of replacing the domestic legislation with an international rule, the national court (or the administration) is required to apply national legislation according to the interpretation suggested by the ECJ.<sup>56</sup> This is a more respectful solution of national competence, but one which ensures at the same time compliance and the uniform application of the international rule in Member States. However, in the absence of direct effect, the very specific criteria laid down by the ECJ, at least in the *Brown Bear* case, do not leave much space to the national court called upon to apply national legislation. This seems even more problematic under the division of vertical competence and division of powers issues.

<sup>50</sup> But see the case of the agreement concluded by the Commission in the field of competition with the US which was annulled because of the lack of competence of the Commission and required the renegotiation of the agreement: see Case C-327/91, *France v. Commission*, [1994] ECR I-3641.

<sup>51</sup> See on this point Casolari, *supra* note 2, at 300.

<sup>52</sup> See *Intertanko*, *supra* note 10; *ATAA*, *supra* note 30; and *IATA*, *supra* note 27.

<sup>53</sup> See Case C-459/03, *Commission of the European Communities v. Ireland*, [2006] ECR I-4635; *Commission v. France*, *supra* note 29; and *Brown Bear*, *supra* note 21.

<sup>54</sup> E.g., in Case C-91/92, *Paola Faccini Dori v. Recreb Srl.*, [1994] ECR I-3325, the national tribunal could not have recourse to consistent interpretation doctrine (to decide a dispute between private parties).

<sup>55</sup> *Ibid.*

<sup>56</sup> Which is what the Slovak Supreme Court actually did. However, in other cases decided later the Slovak Council of State denied direct effect to Art. 9(3) of the Aarhus Convention making reference to the ECJ's *Brown Bear* decision, *supra* note 21, without mentioning the duty of consistent interpretation: see in particular *Buitenring Parkstad Limburg*, Council of State, 29 July 2011, LJN: BR4025, quoted in H.J. Jans, 'European Environmental Cases before Dutch Courts: Observations on Direct Effect and Consistent Interpretation', available online at <http://ssrn.com/abstract=1970270> (last accessed 8 January 2014).